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FEDERAL COMMUNICATIONS COMMISSION TAKES ACTION TO CLARIFY INTELLECTUAL PROPERTY RIGHTS OBLIGATIONS OF INCUMBENT LOCAL TELEPHONE CARRIERS

Commission Rules that Intellectual Property Rights Cannot be Used to Frustrate Competitive Entry into Local Telecommunications Markets

Washington, D.C. – Today, the Federal Communications Commission (FCC) ordered incumbent local exchange carriers (LECs) to use their “best efforts” to obtain intellectual property rights from equipment manufacturers and software suppliers for competitive LECs when the competitive LECs utilize network elements provided by the incumbent LECs. For certain network elements, such as switches, software is required for the network element to work properly, and competitive LECs must sometimes obtain a license for that software when they use the incumbent LEC’s facilities.

The best efforts standard requires LECs to use best efforts to obtain equal rights for competitive CLECs that are equal to the terms and conditions that the incumbent LECs have secured for themselves.

In today’s action, the Commission concluded that the “nondiscriminatory access” obligation of Section 251 of the Telecommunications Act of 1996 requires incumbent LECs to use their best efforts to provide all features and functionalities of each unbundled network element they provide, including any associated intellectual property rights that are necessary for the requesting carrier to use the network element in the same manner as the incumbent LEC. This conclusion is consistent with a recent decision of the United States Court of Appeals for the Fourth Circuit, in which the court held that Section 251(c)(3) imposes an obligation on incumbent LECs to use their best efforts to renegotiate modifications to intellectual property licenses to provide nondiscriminatory access to network elements on the same terms and conditions that incumbent LECs enjoy. *AT&T v. Bell Atlantic*, 197 F.3d 663 (4th Cir. 1999).

The Commission also found that the nondiscriminatory access obligation requires incumbent LECs to allocate any costs associated with acquiring the necessary intellectual property rights among all requesting carriers, including themselves.

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Related Ruling for Section 259 Infrastructure Requests

Additionally, the Commission issued a separate, but related, order modifying its requirement that incumbent LECs are responsible for obtaining intellectual property licensing for the benefit of other carriers, under section 259 of the Act. Section 259 applies only where non-competing carriers share access to an incumbent LECs “public switched network infrastructure, technology, information, and telecommunications facilities and functions.”

The standard established by the Commission in the context of section 259 places the primary burden to obtain third-party intellectual property and licensing rights on the carrier seeking access to the incumbent LEC’s infrastructure. However, the Commission further requires that incumbent LECs exercise "good faith" in assisting the other carrier to obtain intellectual property rights from third parties.

Action by the Commission April 17, 2000 by Memorandum Opinion and Order (FCC 00-139), and Order on Reconsideration (00-140). Chairman Kennard, Commissioners Ness, Furchtgott-Roth, Powell and Tristani.

CC Docket No. 96-98

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